IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEON L. MOISE, *Petitioner,* vs. DAVID BURNET, Commissioner of Internal Revenue, *Respondent.*	No. 6179
GERALD F. SCHLESINGER, *Petitioner,* vs. DAVID BURNET, Commissioner of Internal Revenue, *Respondent.*	No. 6180
LEROY SCHLESINGER, *Petitioner,* vs. DAVID BURNET, Commissioner of Internal Revenue, *Respondent.*	Nos. 6181-6182

BRIEF FOR PETITIONERS.

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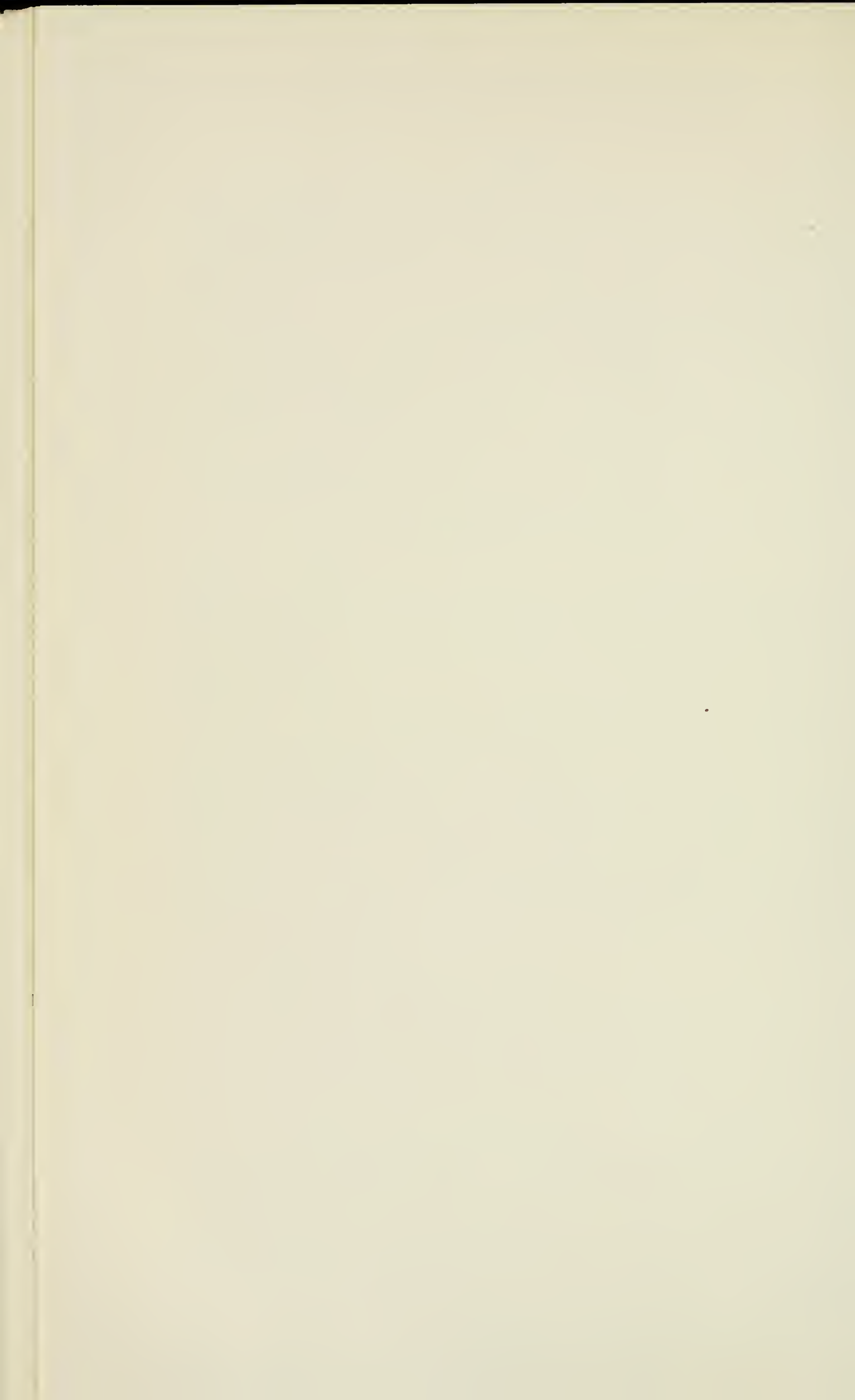

IN THE

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} Nos. 6181-6182

BRIEF FOR PETITIONERS.

INTRODUCTION.

The four above-entitled proceedings are predicated upon petitions, filed pursuant to Sections 1001, 1002

and 1003 of the Revenue Act of 1926, for review o
decisions, adverse to the taxpayers, rendered b
United States Board of Tax Appeals in four cor
responding cases before that tribunal. The decision
by the Board were rendered on December 14th an
15th of 1928. The pending petitions for review wer
filed on June 11, 1929. The taxpayers are all inhabi
tants of the State of California.

The four cases involve substantially the same fact
and issues. Accordingly they were consolidated fo
hearing and decision by the Board (Tr. p. 21). On
set of findings was made and one opinion rendered b
the Board for all four cases. Correspondingly th
four proceedings for review now pending before thi
Court have been duly consolidated (Tr. p. 223). I
consequence this brief is filed in support of the fou
petitions for review.

PRELIMINARY STATEMENT OF FACTS.

For many years and continuously to January 192
the three taxpayers above-named were jointly engage
in a wholesale liquor business known as "Schlesinge
& Bender." This business was conducted through
corporate form of organization until June, 1918, a
which time the corporation was dissolved. Thereupon
to-wit: on July 1, 1918, the aforesaid three taxpayer
formed a partnership, which took over the busines
of the corporation and maintained the same unti
January, 1920, at which time they were obliged to an
did terminate the business by reason of Prohibition
Legislation. This resulted in obsolescence of th

ngible assets and good will of the partnership busi-
ess with heavy losses to the taxpayers (Tr. pp.
2-76).

In the latter half of 1925, the Commissioner of
nternal Revenue mailed four deficiency letters: one
Leon L. Moise covering the years 1918, 1919 and
920 and determining a deficiency in the sum of
5,032.29; one to Gerald F. Schlesinger covering the
ears 1918 and 1919 and determining a deficiency in
e sum of $4,657.96, and two to LeRoy Schlesinger,
f which one, involving the year 1920, determined a
eficiency in the sum of $153.08, and the other, in-
olving the year 1918, rejected a claim in abatement
r $414.99. From each of these four letters the tax-
ayer receiving it filed an appeal with United States
oard of Tax Appeals, claiming error on the part of
e Commissioner with respect to such portion of the
leged deficiency as arose from disallowance of a
eduction for obsolescence of tangible assets of the
artnership business, and alleging that all taxes and
eficiencies for the years in question were forever
arred by the statutes of limitation applicable thereto.

An answer and an amended answer were filed by
e Commissioner in each of the four appeals. The
our proceedings were tried together before the Board
n May 4, 1927. The decision of the Board, promul-
ated on September 25, 1928, was adverse to the tax-
ayers on all points. Not only did it uphold in en-
rety the deficiencies claimed in the sixty-day letters
om which the appeals were taken, but, in addition,
etermined greatly increased deficiencies (Tr. pp. 25-
3). In December, 1928, the Board made and entered

an Order of Redetermination under Rule 50 in each of the four cases, fixing the total deficiency of Leon L. Moise in the sum of $9,633.30, fixing the total of deficiency of Gerald F. Schlesinger in the sum of $9,031.54, and fixing the total deficiency of LeRoy Schlesinger in the sum of $1,748.87 (Tr. pp. 39, 124, 163, 199).

In the cause of conciseness, we shall reserve additional statement of facts for that portion of the brief devoted to the argument.

QUESTIONS INVOLVED.

The principal questions involved in these proceedings (and to which all other questions are subsidiary) are the following:

(1) *Whether the Board erred in holding that the Commissioner, within the meaning of Section 274 (e) of the Revenue Act of 1926, asserted claims for deficiencies greater in amount than those specified in the sixty-day deficiency letters, and whether the Board erred in exercising jurisdiction to determine and in determining deficiencies greater in amount than those specified in the deficiency letters?*

(2) *Whether the Board erred in holding that the taxes for the years in controversy were not barred by the statutes of limitations, and particularly, whether the Board erred in not holding that the additional deficiencies determined by the Board and not claimed or mentioned in the deficiency letters were forever barred by the statutes of limitations?*

(3) *Whether the Board erred in deciding that petitioners were not entitled to a deduction for loss resulting from 'obsolescence of the tangible assets of the partnership business occasioned by Prohibition Legislation?*

(4) *Whether the Board erred in holding that the petitioners were not entitled to a deduction for loss resulting from obsolescence of the good will of the partnership business occasioned by Prohibition Legislation?*

SPECIFICATION OF ERRORS.

The assignments of errors set forth in the petitions r review are substantially the same in all four pro- edings. They are very numerous. Many of them, wever, are merely particularized and specific state- ents of the elements comprising other and more neral assignments. We believe that it will suffi- ently serve the present purpose to enumerate in this ief only the more general assignments. These are follows:

(1) *The Board erred in rendering its decision for respondent and in determining deficiencies in the taxes of Petitioners for the years 1918, 1919 and/or 1920.*

(2) *The Board erred in making Orders of Redetermination and/or decisions pursuant to its findings of fact and opinion promulgated September 25, 1928.*

(3) *The Board erred in holding that the Commissioner did at or before the hearing of said causes assert any claim or claims for any increased deficiency or deficiencies or for any de-*

ficiency or deficiencies in excess of the amounts specified in the deficiency letters.

(4) *The Board erred in holding that by so-called affirmative allegations in his amended answers or otherwise or at all, the Commissioner had asserted claims for increased deficiencies within the meaning of Section 274 (e) of the Revenue Act of 1926, or otherwise or at all.*

(5) *The Board erred in assuming jurisdiction over and in considering and determining as issues matters and items not mentioned in or made subject matter of the Commissioner's letters to petitioners and not otherwise asserted as claims at or before the hearing.*

(6) *The Board erred in holding that the so-called affirmative allegations contained in the amended answers of Respondent were properly included and might remain therein.*

(7) *The Board erred in denying the contention of petitioners with respect to the issue of the statutes of limitations.*

(8) *The Board erred in failing to hold that even if the so-called affirmative allegations contained in the amended answers filed in April, 1927, had constituted assertions of claims for additional deficiencies, such claims for additional deficiencies were nevertheless forever barred by reason of the expiration prior thereto of the statutory period of limitations.*

(9) *The Board erred in its failure to find or hold that Petitioners were entitled to claim deduction for loss occasioned by obsolescence of furniture, equipment, and leasehold improvements of the partnership business and to apportion this loss over the period of eighteen and one-half*

months, beginning with 1918 when the partnership first learned that it would be obliged to terminate the business, and ending in 1920 when the business was terminated by reason of Prohibition Legislation.

(10) *The Board erred in holding that the evidence was insufficient as to the value of the tangible assets of the partnership business with respect to which a deduction for obsolescence was claimed.*

(11) *The Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying Petitioners' contention upon that issue; said finding being wholly unsupported by and contrary to the evidence.*

(12) *The Board erred in holding that petitioners were not entitled to deduct anything for loss occasioned by obsolescence of the tangible assets of their partnership business on account of Prohibition Legislation.*

(13) *The Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.*

(14) *The Board erred in holding that obsolescence of good will is not an allowable deduction from gross income, and in holding that the Commissioner had erred in allowing the partnership a deduction for obsolescence of good will occasioned by Prohibition Legislation.*

ARGUMENT.

I.

NO CLAIM FOR DEFICIENCIES GREATER IN AMOUNT THAN THOSE SPECIFIED IN THE SIXTY-DAY LETTERS WAS ASSERTED BY THE COMMISSIONER AT OR BEFORE THE HEARING WITHIN THE MEANING OF SECTION 274 (e) OF THE 1926 ACT. THE BOARD HAD NO JURISDICTION TO DETERMINE ADDITIONAL DEFICIENCIES.

(a) No Assertion of Claims.

Before the enactment of the Revenue Act of 1926, no authority was vested either in the Commissioner or the Board, where a deficiency letter had been mailed to the taxpayer covering a certain year, to determine any additional deficiency for the same taxable year; except, however, that the Commissioner might mail an additional deficiency letter from which a separate appeal to the Board might be taken by the taxpayer. In the cases now under consideration, the deficiency letters were mailed and the appeals therefrom to the Board were filed in the year 1925, and prior to the enactment of the 1926 Act (Tr. pp. 10, 113, 154, 190). No deficiency letters other than those upon which the appeals to the Board were predicated were ever mailed to the taxpayers with respect to the taxable years in controversy. Therefore, under the law as it existed up to the effective date of the 1926 Act, neither the Commissioner nor the Board had any authority to increase the deficiencies for the years in controversy over the amounts specified in the sixty-day letters sent to the taxpayers.

Let us now examine the Revenue Act of 1926. The only section of this Act from which the Board could

ıope to draw authority to determine additional de-
iciencies is Section 274. The subdivisions of this sec-
ion expressly relate to deficiencies in respect to taxes
mposed by the 1926 Act and to letters of deficiency
nailed after the enactment of the 1926 Act. Unless
y other portions of the 1926 Act this section is clearly
nade retroactive to the extent of applying to taxes
mposed by prior Revenue Acts and to deficiency
etters mailed prior to the enactment of the 1926 Act
nd to Board appeals therefrom, there was no author-
ty that could be vested in the Board even under the
926 Act to determine in these cases deficiencies
reater in amount than those specified in the de-
ciency letters. But let us presently assume for the
ake of argument that Section 274 of the 1926 Act has
uch retroactive effect. What, if any, result follows
n these cases from such an assumption?

Subdivision (f) of Section 274 of the 1926 Act
rovides that

> "If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the taxpayer files a petition with the Board within the time prescribed in such subdivision, the Commissioner shall have no right to determine any additional deficiency in respect of the same taxable year, except in the case of fraud, and except as provided in subdivision (e) of this section or in subdivision (c) of section 279."

The exceptions reserved by subdivision (f) "in
he case of fraud" and "in subdivision (c) of Section
79" (relating to jeopardy assessments) have no
earing upon the present proceedings. The remaining

exception reserved is subdivision (e) of Section 274, which reads as follows:

> "The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, *if claim therefore is asserted by the Commissioner at or before the hearing or a rehearing*" (Italics ours).

Thus it is obvious that under the 1926 Act the Commissioner is limited to one deficiency letter for any taxable year, and the Board has no jurisdiction to determine a deficiency in excess of the amount specified in the sixty-day letter upon which the appeal is predicated, except where the Commissioner asserts a claim for such additional deficiency at or before the hearing.

No deficiency letters were ever mailed to the petitioners for the years in controversy, except those upon which the appeals to the Board were based. Each of those letters specified the amount of deficiency determined by the Commissioner. No claim was ever made by the Commissioner for deficiencies in excess of the amounts specified in the deficiency letters. Nevertheless the Board in its Orders of Redetermination determined deficiencies greatly in excess of the amounts specified in the deficiency letters, basing its action in this behalf upon a disallowance of a deduction for obsolescence of good will of the partnership. This deduction had been allowed by the Commissioner. It was not involved nor made an issue either in the

leficiency letters or in the petitions of appeal. The 3oard, in rendering its opinion, attempted to justify ts position in thus having determined greatly inreased deficiencies, by contending that certain deensive allegations contained in the amended answers mounted to the assertion of a claim for additional leficiencies within the meaning of Section 274 (e) of he 1926 Act.

With respect to these defensive allegations relied on y the Board, the amended answer filed in the case f Leon L. Moise (No. 6179) is typical. The coresponding pleadings in the other three cases vary rom it practically only as to years and amounts. 'hese allegations, as they appear in the amended nswer filed in the Leon L. Moise case, read as follows:

> "4. (a) * * * alleges that the Commissioner erred by not including in the petitioner's income for the year 1918, $5,709.70, for the year 1919, $11,419.39, and for the year 1920, $475.60, said amounts being the petitioner's distributive interest in $52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender as obsolescence of goodwill" (Tr. pp. 16, 17).
>
> * * * * * * *
>
> "5. (c) * * * alleges that the obsolescence of goodwill amounting to $52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction of said copartnership." (Tr. p. 17).

The prayer at the conclusion of each of the amended nswers reads as follows: "Wherefore, it is prayed hat the appeal be denied."

We respectfully submit that it is obvious that purely defensive allegations in the form quoted above, incorporated in the body of an amended answer and followed by a prayer completely negativing any implication of a demand for affirmative relief, certainly do not constitute the assertion of a claim which, under the provisions of Section 274 (e) of the 1926 Act, was the mandatory predicate for the determination of additional deficiency and the indispensable prerequisite to vesting the Board with jurisdiction to determine additional deficiency. Such determination was not something which the Board might perfunctorily accomplish upon its own motion. Under the explicit terms of Section 274 (e) of the 1926 Act, the Board had no jurisdiction whatsoever to determine an additional deficiency *unless a claim therefor was asserted by the Commissioner at or before the hearing.* Under the statute the assertion of a claim was no mere perfunctory gesture. It was expressly conceived as an instrument upon which depended a vastly extended jurisdiction of the Board and from which might flow consequences of far-reaching import to the taxpayer.

Since Section 274 (e), requiring the assertion of a claim for additional deficiency, was enacted contemporaneously with Section 274 (f), which prohibits the Commissioner from mailing further deficiency letters for the same taxable year where the taxpayer has appealed to the Board from a deficiency letter sent, it is obvious that Congress conceived the assertion of a claim under Section 274 (e) as a substitute for the costly procedure of mailing successive deficiency letters for the same year, each of which might become

he basis of a separate appeal to the Board. In other
ords, the claim under Section 274 (e) is a device
lculated to avoid a multiplicity of proceedings be-
ore the Board by serving the function previously per-
ormed by the cumbersome procedure of successive
eficiency letters. The successive deficiency letters
ould have been definite in the assertion of demand
nd specific in the statement of amount. It was the
ovious intention of Congress, we submit, that a claim
nder Section 274 (e) should have the same dignity
s the successive deficiency letters formerly resorted
o, or that at least it should be what the statute
esignates—a *claim asserted* by the Commissioner. In
her words, a claim under Section 274 (e) must be
he affirmative expression of a demand and not merely
passive and defensive confession by the Commis-
oner of his past error, followed by a prayer which
ompletely negatives the suggestion of a claim for
lditional deficiency.

The allegations relied on by the Board assert *no
aim for anything.* They make *no demand.* They
pecify *no amounts of tax.* They merely allege defen-
vely that the Commissioner erred by not including
n the income of Petitioners the amount deducted by
he partnership as obsolescence of good will and pro-
aim the legal conclusion that the obsolescence of good
ill deducted by the partnership was not an allowable
eduction. Nowhere in the amended answers is it
ated that in consequence of the professed error
leged and the conclusion of law proclaimed the
ommissioner prays for or elects to demand a deter-
ination of additional deficiency. Thus the allega-

tions relied upon by the Board are purely defensive matter. They are followed in each case by a prayer which merely requests *"that the appeal be denied"* (Tr. p. 18). The purpose of the appeals was to extinguish the deficiencies claimed in the deficiency letters. The denial of the appeals would simply mean the overruling of the taxpayers' objection to the deficiencies asserted in the letters and a ratification and affirmance of those deficiencies. This and *nothing more* was asked for in the amended answers.

In the case of *United States v. Sloan Shipyards Corporation*, 270 Fed. 613, 617, pertinent by way of analogy to the present proceedings, the Court said in part:

> "The relief demanded is gauged by the prayer. This gives the defendants such precise information as to the judgment demanded, if default is made, so they may be able to decide whether or not to defend. Section 258, Code Wash.; Rush v. Brown, 101 Mo. 586, 14 S. W. 735; Arrington v. Liscom, 34 Cal. 375, 94 Am. Dec. 722; Noonan v. Nunan, 76 Cal. 44 at page 49, 18 Pac. 98. There is no prayer for judgment to determine the amount and for impressing the claim upon the property as a lien and for an order of sale. The action, stripped of all of the verbiage except the essentials necessary upon the declared contract leaves the action as one at common law upon simple contract, and under all of the authorities this court is without jurisdiction to seize the property and sell it and distribute the proceeds through a receivership, nor can it proceed otherwise because no other relief is demanded. Notwithstanding the pleading is denominated a bill in equity, the contents determine its relation."

We quote the following from the case of *Hurley-ason Co. v. The United States,* 60 Court of Claims eports, 764:

> "On the 11th day of May, 1925, it was ordered by the court that the defendant's motion for leave to file a counterclaim be allowed. * * *
>
> There was presented but not filed what purports to be defendant's answer and counterclaim. Attention is called to this alleged counterclaim. * * * A counterclaim should state definitely the claim which the Government makes against the plaintiff, and a report made by the Accounting Office can not be attached as part of the counterclaim."

In the present cases, no demand for deficiencies lditional to those specified in the 60-day letters was er made in any part of any document, or at the aring, or in any manner, at any time or at all. To ve to the defensive allegations of the amended iswers the force of claims for additional deficiencies ithin the meaning of Section 274 (e) of the 1926 ct, would in effect be giving to the Board the jurisction to determine additional deficiencies upon its vn motion, whenever anything in the cases before it ould suggest to its mind a possible basis for additional deficiencies. This would in effect nullify the feguard established by Section 274 (e) in requiring assertion by the Commissioner of a claim for addional deficiency.

What lends further support to the contention of titioners that no claim for additional deficiency was serted by the Commissioner in his amended answers the following revelatory data:

In the case of Leon L. Moise (No. 6179) the tota amount of deficiency specified in the deficiency lette was $5,032.29. In the amended answer, relied on b the Board as the assertion of a claim for additiona deficiency, the amount of taxes alleged to be in con troversy is $5,980.77 (Tr. pp. 10, 16). The relativel negligible difference between these two amounts, to wit: the sum of $948.48, is obviously the result of mere mathematical recomputation. On the other hand the Order of Redetermination (Tr. p. 39), based upo the opinion of the Board and adding to the income o the taxpayer for the years in question his distributiv share of the amount deducted by the partnership fo obsolescence of good will, determined a deficiency i the aggregate amount of $9,633.30, thus fixing th total deficiency in a sum of $3,652.53 in excess of th amount specified in the amended answer. This sur of $3,652.53 clearly covered the additional deficienc resulting from a disallowance of a deduction fo obsolescence of good will and was not demande specified or included in the amended answer.

In the case of Gerald F. Schlesinger (No. 6180) the total amount of deficiency specified in the de ficiency letter was $4,657.96. In the amended answe relied on by the Board as the assertion of a claim fo additional deficiency, the amount of taxes alleged to b in controversy is $5,532.03 (Tr. pp. 113, 119). Th relatively negligible difference between these tw amounts, to-wit: the sum of $874.07, is obviously th result of a mere mathematical recomputation. On th other hand, the Order of Redetermination (Tr. p 124), based upon the opinion of the Board and addin

o the income of the taxpayer for the years in question is distributive share of the amount deducted by the partnership for obsolescence of good will, determined deficiency in the aggregate amount of $9,031.54, thus ixing the total deficiency in a sum $3,499.51 in excess f the amount specified in the amended answer. This um of $3,499.51 clearly covered the additional deiciency resulting from a disallowance of a deduction or obsolescence of goodwill and was not demanded, pecified or included in the amended answer.

It is obvious, we submit, from the foregoing that he amended answers did not assert or contemplate a laim for additional deficiencies resulting from disllowance of a deduction for obsolescence of goodwill.

It must also be remembered that the additional leficiencies determined by the Board did not involve nere arithmetical corrections or recomputations. They esulted from an injection into the cases by the Board of entirely new and different subject matter not raised either by the deficiency letters or the petiions of appeal.

The contention of petitioners that no claim for additional deficiencies was asserted by the Commissioner has been clearly and strongly expressed in the lissent of Member Van Fossan of United States Board of Tax Appeals, attached to the opinion of the Board in these cases. Member Van Fossan conducted he hearing of these cases. His dissenting opinion was oncurred in by Member Lansdon. This dissenting opinion appears on pages 35-38 of the transcript. It reads as follows:

"I am unable to agree with the prevailing opin ion on the third issue of the case. This issue in volved the determination of whether or not th Commissioner has effectively asserted the clain for the additional amount or addition to the ta beyond that set forth in the original notices o deficiencies.

Section 274 (e) provides:

The Board shall have jurisdiction to redeter mine the correct amount of the deficiency eve if the amount so redetermined is greater tha the amount of the deficiency, notice of which ha been mailed to the taxpayer, and to determin whether any penalty, additional amount or addi tion to the tax should be assessed, *if claim* there for *is asserted* by the Commissioner at or befor the hearing or a rehearing. (italics ours)

As I read this section, the assertion of a clain for the additional amount or addition to the ta is a prerequisite to the finding by the Board o such additional amount. There are sound con siderations of justice and fairness back of such provision. Petitioner, upon receipt of a notice o a specific deficiency, prepares his petition in re liance on the representations as to the Govern ment's contentions set forth in the notice. Hi petition is specifically addressed to those conten tions and his preparations to contest the deficienc are confined thereto. Section 274 (f) specificall forbids, in cases subsequently arising, the deter mination of an additional deficiency except i case of fraud or as provided in Section 274 (e) *supra,* or in case of a jeopardy assessment unde Section 279 (c). By this prohibition Congres has indicated its disposition to protect the tax payer from repeated deficiency notices coverin

the same year or from uncertainty in the issues which he is called on to meet. If the Government proposes a greater deficiency under section 274 (e), I believe the taxpayer is entitled to demand that the statute be strictly complied with and that it be construed strictly against the Government. He should not be left to infer the asserting of a claim from the general tenor of affirmative allegations of the amended answer.

In the proceedings under consideration the Commissioner has not asked directly for affirmative relief from his alleged error. He made no motion to increase the deficiency appealed from. Upon permission to amend the answers he incorporated affirmative allegations that he had erroneously allowed obsolescence. The prayer of his answer is that the proceedings be dismissed. He now asks us to hold that this allegation of error on his part constitutes the assertion of a claim for additional tax under the statute. With this I cannot agree. In such a situation the taxpayer is entitled to shield himself behind every defense the law affords. The law has provided that a claim shall be asserted for the additional amount of tax. Considering the purpose and language of the statute this provision would seem to require an affirmative act of assertion. Nothing so vital to the rights of a taxpayer as the finding of a greater deficiency should be left to implication. The proper assertion of a claim is not a difficult task if directly essayed. A motion could have been made at any time during the hearing. On the other hand, to infer or imply the assertion of a claim in the instant cases will open the door to loose pleadings and place on the Board in other cases the burden of interpreting the mind of the Commissioner. The statute provides a simple

procedure, and having failed to avail himself thereof, the Commissioner has no basis for complaint.

In my opinion respondent has not effectively or properly asserted a claim for the additional amount or addition to the tax as required by law."

(b) Section 274 (e) of the 1926 Act is Not Applicable to These Cases, and the Board Had No Authority to Increase the Deficiencies.

The foregoing discussion has been based upon the assumption, made for the purpose of argument, that Section 274 (e) of the 1926 Act was applicable to the present cases. We respectfully submit, however, that a reading of the Revenue Act of 1926 shows that Section 274 (e) was not retroactive in its effect and did not apply in cases, like the present ones, where deficiency letters had been mailed and appeals therefrom commenced before the effective date of the 1926 Act.

It is Section 274 (e) alone which could under any circumstances authorize the Board, in any case before it, to determine a deficiency in excess of the amount specified in the deficiency letter upon which that case is based, and even then, only in the event that a claim for such additional deficiency is asserted by the Commissioner at or before the hearing. Section 274 and the subdivisions thereof are expressly made applicable to deficiencies in the taxes imposed by the 1926 Act and to deficiency letters mailed after the enactment of the 1926 Act and to proceedings growing out of such letters.

Among the provisions of the 1926 Act attempting in certain respects to make that Act retroactive in effect,

he only ones, we believe, that are at all applicable to he present cases are subdivisions (a) and (b) of Section 283.

Subdivision (b) of Section 283 provides that, in the ase of appeals to the Board commenced before and pending at the time of the enactment of the 1926 Act, "the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the Courts, shall be determined, and the computation of he tax shall be made, in the same manner as provided in subdivision (a) of this section, except" in certain circumstances not applicable to the present cases. This subdivision merely relates to the situation of the parties and the Board *within and with respect to a pending appeal.* It does not purport to affect the right of the Commissioner to send out successive deficiency letters for the same taxable year and to limit him to the assertion of a claim for additional deficiencies at or before the Board hearing. It refers us for fuller data upon its own subject matter to Section 283 (a). And Section 283 (a) provides that in the case of a determination of tax provided for in that section and specified in a deficiency notice sent by registered mail, the amount of tax computed and specified in such deficiency notice "shall be assessed, collected and paid in the same manner and subject to the same provisions and limitations * * * as in the case of a deficiency in the tax imposed by this title * * *." "The case of a deficiency in the tax imposed by this title" is probably referable to Section 274 of the 1926 Act. But Section 283 (a), in referring to

Section 274 for the purpose of establishing the manner of assessment, collection and payment of a specific tax covered by a particular deficiency notice mailed to the taxpayer, obviously does not incorporate by reference the provision of Section 274 (f), which prohibits, in the case of future determinations of deficiency, the mailing of more than one deficiency letter for the same taxable year, or the provision of Section 274 (e), which prescribes the assertion of a claim at or before the hearing as the sole means of determining an additional deficiency. It is a well established rule that in the construction of statutes they will not be given a retroactive effect unless the purpose to give them such effect is clearly and explicitly expressed and beyond dispute. It has been frequently held that the presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.

> *Russell v. United States*, 278 U. S. 181-188, 73 L. Ed. 255, 256;
>
> *United States v. Whyel*, 28 Fed. (2d) 30, 32, (Circuit Court of Appeals, Third Circuit);
>
> *Clinton Iron & Steel Co. v. Heiner*, 30 Fed. (2d) 542;
>
> *United States F. & G. Co. v. U. S. Use of S. W. Co.*, 209 U. S. 306, 52 L. Ed. 804, 807.

If in the course of construing such a statute uncertainties appear they must be resolved in favor of the taxpayer. In the case of *United States v. Burden, Smith & Co.*, 33 Fed. (2d) 229 (Circuit Court of Appeals, Fifth Circuit), the Court said:

"Taxing statutes are to be interpreted liberally in favor of the taxpayer."

We respectfully submit that a reading of the subdivisions of Sections 274 and 283 of the 1926 Act will show that Section 274 (e) was not made or intended to be retroactive in effect so as to be applicable to the present cases and that therefore the Board erred in exercising jurisdiction to determine additional deficiencies. No additional deficiency letters were mailed to the petitioners. In the present cases such additional deficiency letters would, we submit, have constituted the only means whereby additional deficiencies could have been claimed for the years involved. We respectfully urge that under the construction of the statute to which the taxpayers are entitled, as aforesaid, Section 274 (e) of the 1926 Act was not applicable to the present cases.

II.

STATUTES OF LIMITATIONS.

(a) The Additional Deficiencies Determined by the Board Were Forever Barred and Liability Therefor Extinguished Long Before the Filing of the Amended Answers Which the Board Construed as the Assertion of a Claim Within the Meaning of Section 274 (e) of the 1926 Act.

With respect to Leon L. Moise, the proceedings before the Board involved the years 1918, 1919, and 1920. His return for 1918 was filed not later than March 15, 1919 (Tr. pp. 27-28). Therefore, without reference to waivers or any purported suspension of the statute of limitations, the statutory period for that year expired on March 15, 1924. The last waiver

executed by Leon L. Moise for the year 1918 expired on December 31, 1925 (Tr. p. 86). The return of Leon L. Moise for the year 1919 was filed not later than March 15, 1920 (Tr. p. 28). Therefore, his income taxes for the year 1919, without regard to waivers or any purported suspension of the statute of limitations, became barred on March 15, 1925. The last waiver executed by Leon L. Moise for the year 1919 expired on December 31, 1925 (Tr. p. 100). The income tax return of Leon L. Moise for 1920 was filed on April 7, 1921 (Tr. p. 84). Therefore, his income taxes for the year 1920, apart from waivers or any purported suspension of the statute of limitations, became barred on April 7, 1926. There is no evidence of any waivers having been given by Leon L. Moise for the year 1920.

With respect to Gerald F. Schlesinger, the proceedings before the Board involved the years 1918 and 1919. His income tax return for the year 1918 was filed not later than March 22, 1919 (Tr. p. 28). Therefore, his income taxes for 1918, without reference to waivers or any purported suspension of the statute of limitations, became barred on March 22, 1924. The last waiver executed by Gerald F. Schlesinger for the year 1918 expired on December 31, 1925 (Tr. pp. 90-91). The income tax return of Gerald F. Schlesinger for the year 1919 was filed on March 15, 1920 (Tr. p. 28). Therefore, his income taxes for the year 1919, irrespective of waivers or any purported suspension of the statute of limitations, became barred on March 15, 1925. The last waiver executed by Gerald F. Schlesinger for the year 1919 expired on December 31, 1925 (Tr. pp. 92-93).

With reference to LeRoy Schlesinger, the proceed-
ngs before the Board involved the years 1918 and
920. His income tax return for the year 1918 was
iled not later than March 15, 1919 (Tr. p. 29). There-
'ore, his income taxes for the year 1918, without
egard to waivers or any purported suspension of the
tatute of limitations, became barred on March 15,
.924. The last waiver executed by LeRoy Schlesinger
'or the year 1918 expired on March 1, 1925 (Tr. pp.
)7-99). His income tax return for the year 1920 was
iled on April 6, 1921 (Tr. pp. 83-84). Therefore, his
ncome taxes for the year 1920, without regard to
vaivers or any purported suspension of the statute
)f limitations, became barred on April 6, 1926. The
evidence shows no waivers of LeRoy Schlesinger for
he year 1920.

The Revenue Act of 1926 became effective on Febru-
ury 26, 1926. It is obvious from the foregoing, that,
ıpart from a purported suspension of the statute of
imitations through mailing of deficiency letters and
pendency of Board appeals therefrom, the taxes of
Leon L. Moise for the years 1918 and 1919, the taxes
of Gerald F. Schlesinger for the years 1918 and
1919, and the taxes of LeRoy Schlesinger for the
vear 1918 all became barred before the 1926 Act went
into effect.

The motions of the Commissioner to file the amended
answers relied upon by the Board as the assertion of
claims for additional deficiencies were not filed until
April 7, 1927. The motions were granted on April 8,
1927. The amended answers were filed on April 8,
1927 (Tr. p. 1). It is thus obvious from the previous

paragraphs that the taxes of Leon L. Moise for the years 1918, 1919, and 1920, the taxes of Gerald F. Schlesinger for the years 1918 and 1919, and the taxes of LeRoy Schlesinger for the years 1918 and 1920, apart from any purported suspension of the statute of limitations through the mailing of deficiency letters and pendency of Board appeals therefrom, were all barred long before the motions for leave to file amended answers were made.

The Board held in its opinion (Tr. pp. 34-35) that the amended answers constituted the assertions of claims for additional deficiencies within the meaning of Section 274 (e) of the 1926 Act. It is our contention that these additional deficiencies were foreve barred and all liability therefor extinguished long before those amended answers were filed. When the motions were made for leave to file the amended answers, the normal five-year periods from the filing of the returns had long since expired. The periods of the last waivers had long since expired. And the provisions of the Revenue Acts for the suspension of the statute of limitations upon the mailing of a deficiency letter and during the pendency of an appeal to the Board therefrom, obviously applied only to the deficiencies specified in the deficiency letters and had no reference whatever to additional deficiencies which were first asserted, if at all, nearly two years after the deficiency letters were mailed. It is upon this very last point that the Commissioner will probably attempt to take issue with us.

All of the deficiency letters in these cases were dated July 29, 1925, except the one sent to LeRoy Schles

nger for the year 1918, which is dated September 4, 925 (Tr. pp. 10, 113, 154 and 190).

The waiver given by LeRoy Schlesinger for the ear 1918 expired on March 1, 1925. (By mistake it vas printed twice in the Record (Tr. pp. 97-99). 'he deficiency letter to LeRoy Schlesinger for the ear 1918 is dated September 4, 1925—nearly six ionths after the expiration date of the waiver. This eficiency letter represented a rejection of a claim in batement for $414.99 with respect to taxes for the ear 1918. Since the amended answer relied on by he Board as the assertion of a claim for additional eficiency was filed in the appeal taken to the Board rom that very same deficiency letter, and since that etter is dated over six months later than the expiraion date of the waiver, it is obvious that the provi-ions of the Revenue Acts with respect to the suspen-ion of the statute of limitations has no application vhatever; for any additional taxes were forever arred long before the mailing of the deficiency letter nd the inception of the appeal taken therefrom. 'herefore the determination of an additional defi-iency against LeRoy Schlesinger for the year 1918 vas clearly erroneous.

With respect to Leon L. Moise, the period of the vaivers for 1918 and 1919 and the normal five-year eriod of limitations for 1920, all extended beyond he date of the deficiency letter. With respect to ferald F. Schlesinger, the period of waivers for 1918 nd 1919 likewise extended beyond the date of the leficiency letter. With respect to LeRoy Schlesinger, he normal five-year period of limitation for 1920

extended beyond the date of the deficiency letter. In these instances, therefore, question of the applicability of the Revenue Act provisions for suspension of the statutes of limitations pending a Board appeal to purported claims for additional deficiency first asserted during the pendency of such appeal is at least relevant. Let us therefore examine the provisions of the Revenue Acts relating to the suspension of the statutes of limitations pending Board appeals.

Section 277 (b) of the Revenue Act of 1924 provides as follows:

> "The period within which an assessment is required to be made by subdivision (a) of this section *in respect of any deficiency* shall be extended (1) by 60 days if a notice of *such* deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such notice and the date of the final decision by the Board." (italics ours)

The express language of the section just quoted clearly indicates that the extension of time for which it provides relates only to the particular and specified deficiency mentioned in and covered by the deficiency letter appealed from and to *none other.* Moreover, in the 1924 Act no provision was made for the determination of deficiencies additional to those specified in the deficiency letters, except the implication that such additional deficiencies might be demanded through additional deficiency letters, from each of which a sep-

rate appeal might be filed with the Board. The provision allowing the Commissioner to assert a claim for additional deficiency at or before the hearing of a Board appeal and giving to the Board under such circumstances the jurisdiction to determine such additional deficiency was first enacted in 1926 (see Section 274 (e) of the 1926 Act).

Let us now turn to the Revenue Act of 1926.

Section 277 (b) of the Revenue Act of 1926 provides as follows:

> "The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a proceeding in court for collection, *in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274)* be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter." (italics ours)

The "period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court" is covered by Section 274 (a) of the 1926 Act, which provides as follows:

> "If in the case of any taxpayer, the Commissioner determines *that there is a deficiency in respect of the tax imposed by this title*, the Commissioner is authorized to send *notice of such deficiency* to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax

Appeals for a redetermination of the deficiency. Except as otherwise provided in subdivision (d) or (f) of this section or in sections 279, 282, or 1001, no assessment of a deficiency in respect of the tax imposed by this title and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until *such* notice has been mailed to the taxpayer, nor until the expiration of such 60-day period, nor, if a petition has been filed with the Board, until the decision of the Board has become final." (italics ours)

It is obvious, we submit, that the sections just quoted from the 1926 Act are the same in their effect as the corresponding Section 277 (b) of the 1924 Act. It was the evident purpose of the provisions of both Acts to protect both the Commissioner and the taxpayer with respect to the particular deficiency specified in the letter during the pendency of an appeal from that letter; the former being protected from a bar of the deficiency specified and the latter being protected from an assessment of that deficiency which would render his appeal abortive.

It was clearly not the motive of Congress in the 1926 Act to suspend the statute of limitations with respect to a deficiency not determined or specified in the deficiency letter but which might a year or more after the inception of the appeal be claimed for the first time by the Commissioner through an assertion at or before the hearing under Section 274 (e) of the 1926 Act. Such a grossly extended application of Section 277 (b) of the 1926 Act not only does violence to its language but actually results in inflicting a

evere penalty upon the taxpayer for instituting the ppeal. It would mean an unprecedented relaxation 1 one particular situation of the vigilance uniformly emanded of the Commissioner by the statutes with espect to the timely assertion of claims for defiiencies. It would mean that by merely exercising a ight of appeal, which the law has created for his rotection, the taxpayer actually revives a tax liaility otherwise long since barred.

Section 274 (e) of the 1926 Act gives the Board urisdiction to determine additional deficiencies *only* n the event that claims for such additional defiiencies are asserted by the Commissioner at or before he hearing. In other words, the Commissioner is ust as much obliged to assert a claim for *additional* eficiency as he was obliged, by way of a sixty-day etter, to assert a claim for the *original* deficiency. f the sixty-day letter is mailed too late, the deficiency laimed therein is forever barred. Correspondingly, f the assertion of a claim for additional deficiency nder Section 274 (e) is made (save for the suspenion of the statute) after the statutory period of imitation has expired, the additional deficiency thus laimed must likewise be deemed forever barred. There is nothing in the 1926 Act indicating a more enient standard of vigilance for the Commissioner n the case of asserting claims under Section 274 (e) han in the case of mailing deficiency letters. Moreover, Section 274 (f) of the 1926 Act provides that

> "If after the enactment of this Act the Commissioner has mailed to the taxpayer notice of a deficiency as provided in subdivision (a), and the

> taxpayer files a petition with the Board withi the time prescribed in such subdivision, the Com missioner shall have no right to determine an additional deficiency in respect of the same tax able year, except in the case of fraud, and excep as provided in subdivision (e) of this section o in subdivision (c) of section 279."

Prior to the effective date of the 1926 Act the Com missioner might send out successive deficiency letter covering the same taxable year, and it was in fact hi habit to do so. If any of these additional letter claiming additional deficiency were mailed after th expiration of the statutory period, the additional de ficiency claimed therein was barred. Under Sectio 274 (f), *supra,* enacted in 1926, the Commissione became limited in normal cases to one mode of claim ing deficiencies additional to those specified in th sixty-day letters from which appeals were taken, an that was *by the assertion of a claim under Sectio 274 (e)*. Obviously, the assertion of claims unde Section 274 (e) was conceived and operates as a sub stitute for the previous method of claiming additiona deficiencies by way of successive sixty-day letters. I is clear that the older method was abolished and th new method enacted to avoid a multiplicity of proceed ings before the Board. We respectfully urge tha under these circumstances claims for additional defi ciencies under Section 274 (e) are subject to the sam limitations as claims previously asserted through suc cessive deficiency letters, and that upon this groun alone, and apart from other reasons, the suspensio of the statute of limitations provided for in Sectio

277 (b) of the 1926 Act should not be deemed ap-
plicable to prevent the bar of the additional defi-
ciencies which, in this case, according to the view of
he Board, were claimed by way of amended answers.

Under the 1924 Act and up to the effective date
of the 1926 Act, there was no provision in the law
for determining deficiencies for any year additional
o those specified in a 60-day letter, either by asser-
ion of a claim at or before the hearing of the Board
ppeal or in any other manner, except by the mailing
f additional deficiency letters. In the present cases,
he deficiency letters mailed to the taxpayers in 1925,
lid not specify or demand, either in facts or figures,
ny deficiency growing out of disallowance of a de-
luction for obsolescence of goodwill. And under the
924 Act, then in effect, the appeals taken from those
leficiency letters could not result in the determination
f deficiencies greater than the amounts demanded in
he letters. No other deficiency letters demanding
dditional or increased deficiencies for the same years
vere ever mailed to the taxpayers. In fact no other
leficiency letters at all were mailed to the taxpayers.
The last waivers of Gerald F. Schlesinger and Leon
L. Moise for the years 1918 and 1919 expired on
December 31, 1925. Therefore, under the 1924 Act, on
January 1, 1926, all deficiencies for 1918 and 1919,
not already claimed by deficiency letters, were barred.
The 1926 Act became effective on February 26, 1926—
nearly two months later. The appeals of these tax-
payers were pending before the Board at that time.
The 1926 Act provided, in Section 1106 (a) thereof,
hat "the bar of the statute of limitations against

the United States in respect of any Internal Revenue tax shall not only operate to bar the remedy but shall extinguish the liability." Can it then be seriously contended that the 1926 Act, merely by enacting Section 274 (e), which provides for the assertion of claims for additional deficiencies at or before the hearing, actually revived additional deficiencies in tax never before and not then yet claimed and which, according to the 1924 Act, were already barred when the 1926 Act went into effect? Can it be seriously contended that the 1926 Act gave to Section 277 (b) an import so extended that it not only suspended the statute of limitations as to taxes which were the subject of a pending Board appeal at the time the 1926 Act went into effect, but also actually operated to revive additional taxes never before claimed and not then yet claimed and which were barred before that Act became effective? The 1926 Act obviously intended within certain limits to convert appeals pending before the Board at the time it went into effect from proceedings under the 1924 Act to proceedings under the 1926 Act. But there is absolutely nothing in the 1926 Act which makes it retroactive to the extent of reviving through the instrument of pending Board appeals taxes never before claimed and already barred at the time it went into effect.

In the first place, Sections 273 and 274 of the 1926 Act, relating to deficiencies and proceedings with respect thereto, expressly apply to taxes imposed by the 1926 Act and not to taxes imposed by previous Revenue Acts.

The only sections of the 1926 Act which could possibly be construed as giving a retroactive effect to any f the provisions of Section 274 (of which subdivision e) refers to the assertion by the Commissioner of aims for additional deficiencies) is Section 283 of the 926 Act.

Subdivision (b) of Section 283 relates to appeals led with the Board before and pending at the time f the enactment of the 1926 Act. It provides that

> "In all such cases the powers, duties, rights, and privileges of the Commissioner and of the person who has brought the appeal, and the jurisdiction of the Board and of the courts, shall be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section,"

xcept in certain instances which have no application o the present proceedings. Subdivision (a) of Secion 283, referred to in Subdivision (b), provides as ollows:

> "If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or by any such Act as amended, the Commissioner is authorized to send by registered mail to the person liable for such tax notice of the amount proposed to be assessed, which notice shall, for the purposes of this Act, be considered a notice under subdivision (a) of section 274 of this Act."

It further provides that in case of any such deterr
nation the amount computed

> "shall be *assessed, collected, and paid* in the sa
> manner and subject to the same provisions a
> limitations (including the provisions in case
> delinquency in payment after notice and dema
> and the provisions prohibiting claims and su
> for refund) as in the case of a deficiency in t
> tax imposed by this title, except as otherw
> provided in section 277 of this Act." (italics ou

This subdivision merely means that the amount
tax computed and covered by registered letter to t
taxpayer shall be assessed, collected, and paid in t
same way and subject to the same provisions and lin
tations as a deficiency in taxes imposed by the 19
Act. Subdivisions (a) and (b) of Section 283, wh
read together, mean simply this: That in cases
Board appeals pending at the time of enactment of t
1926 Act, the powers, duties, rights and privileges
the parties and the jurisdiction of the Board, wi
respect to the manner of assessment, collection, a
payment of the deficiency claimed in the deficien
letter shall be the same as in the case of a deficien
in tax imposed by the 1926 Act. There is nothing
either of these sections or anywhere else which giv
such retroactive and reviving effect to Section 274 (
or Section 277 (b) as will revive an additional d
ficiency barred before the enactment of the 1926 A
or as will give to the Commissioner the right to ass
at or before the hearing of a Board appeal, a clai
for additional deficiency long since barred. In t
case of *Russell v. United States*, 278 U. S. 181-18
73 L. Ed. 255, 256, the Supreme Court said in pa

"Manifestly, but for Sec. 278 petitioners would be free from liability under the five year limitation in the Act of 1918, continued by the Act of 1921. If Sec. 278 refers only to assessments made after June 2, 1924, petitioners are not liable.

If an assessment made before that date comes within the ambit of Sec. 278, *its effect would be retroactive;* and certainly it would produce radical change in the existing status of the claim against the petitioners—*would extend for some five years a liability which had almost expired.* United States v. Magnolia Petroleum Co., 276 U. S. 160, 72 L. Ed. 509, 48 Sup. Ct. Rep. 236, declares: *'Statutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears.'* No plain purpose to change the status of the claim against petitioners as it existed just before June 2, 1924, can be spelled out of the words in Sec. 278 or otherwhere.

Paragraph (e), (2), of Sec. 278 expressly directs that that section shall not affect any assessment made before June 2, 1924. Counsel for the United States maintain that to extend the time for bringing suit thereon does not 'affect' an assessment within the meaning of the paragraph. We cannot agree. Some real force must be given to the words used—they were not employed without definite purpose. The rather obvious design, we think, was to deprive Sec. 278 of any possible application to cases where assessment had been made prior to June 2, 1924.

The legislative history of the Act of 1924 lends support to the conclusion which we have reached. The changes introduced into the Act of (Febru-

ary 26) 1926 (44 Stat. at L. 9, Chap. 27, U. S. C. title 26, Sec. 1272), cannot authorize construction of the earlier one not consonant with the language there employed.

The judgment is reversed." (italics ours)

In the case of *United States F. & G. Co. v. U. S. Use of S. W. Co.,* 209 U. S. 306; 52 L. Ed. 804, 807, the Supreme Court said:

"There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes, as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was *not* meant to act retrospectively, and it ought never to receive such a construction if it is susceptible *of any other.* It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." (italics ours)

In the pertinent case of *Fullerton-Krueger Lumber Company v. Northern P. R. Co.,* 266 U. S. 435; 69 L. Ed. 367, 368, the Supreme Court said in part:

"Admitting original liability, the Railway Company relied upon the local statute of limitation, fixing six years as the time within which such actions must be begun. To this the reply was that the prescribed period of limitation had been extended by Par. (f), Sec. 206, Federal Transportation Act February 28, 1920, 41 Stat. at L. 456, 462, chap. 91 Comp. Stat. Sec. 10,071¼cc, Fed. Stat. Anno. Supp. 1920, p. 79, which provides: 'The period of Federal control shall not be com-

puted as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal control.'

*   *   *   *   *   *   *

The supreme court of Minnesota held, rightly, we think, that the Transportation Act was *not intended to revive or restore rights of action barred before it became effective.*

'It is a rule of construction that all statutes are to be considered prospective unless the language is express to the contrary, or there is a necessary implication to that effect.' Harvey v. Tyler, 2 Wall. 328, 347, 17 L. Ed. 871, 875; Sohn v. Waterson, 17 Wall. 596, 599, 21 L. Ed. 737, 738; Twenty Per Cent Cases, 20 Wall. 179, 187, 22 L. Ed. 339, 341; Chew Heong v. United States, 112 U. S. 536, 559, 28 L. Ed. 770, 778, 5 Sup. Ct. Rep. 255; Schwab v. Doyle, 258 U. S. 529, 534, 66 L. Ed. 747, 752, 26 A. L. R. 1454, 42 Sup. Ct. Rep. 391. And see Hopkins v. Lincoln Trust Co., 233 N. Y. 213, 135 N. E. 267." (italics ours)

In the case of *Burden, Smith & Co. v. United States,* 32 Fed. (2d) P. 830-831, the Court said in part:

"Payment of taxes referred to in section 611 (made before or within one year after the enactment of the Act) is not overpayment. Therefore the taxes referred to in that section are taxes which are not barred. The tax in this case was barred when paid and is still barred, unless the bar was removed by section 611. Therefore, to defeat recovery by the taxpayer, section 611 must be construed so as retroactively to extend the

> period of limitation for collection of taxes therein referred to.
>
> (3) In the first place, a statute should not be given a retroactive effect, unless from the language used it clearly appears that Congress so intended. There is apparently no logical or equitable reason for extending the time in all cases in which a claim in abatement was filed, and there was a stay, without regard to the length of the stay. Section 611 is not clear in meaning, and should not be construed to remove a bar which had already attached when the tax was paid."

In connection with the foregoing discussion, we respectfully direct the Court's attention to the fact that not only were the additional deficiencies in the present cases barred under the 1924 Act, but all liability therefor was extinguished by virtue of Section 1106 (a) of the 1926 Act.

All the waivers in these cases were given and expired prior to the enactment of the 1926 Act. A few of the waivers (Tr. pp. 86, 90, 91, 92, 93, 100 and 101) incorporate the provision of Section 277 (b) of the 1924 Act, providing that the waivers shall expire on the date therein specified, except that if a notice of deficiency is mailed before said date and an appeal is filed with the Board, then the time shall accordingly be extended. Since at the time these waivers were executed, the 1926 Act was not yet in effect, this provision in the waiver for extension in the event of appeal from a deficiency letter, could not have meant an extension for the purpose of permitting the Com-

missioner to assert an otherwise barred claim for additional deficiency under Section 274 (e) of the 1926 Act. It merely meant an extension for the purpose of determining the controversy with respect to the particular deficiency specified in the letter appealed from; in other words, an extension for the purpose of culminating an appeal within the more limited scope of the 1924 Act.

If, in these cases, the taxpayers had acquiesced in the deficiencies and paid the same, instead of filing appeals with the Board, obviously no claims for additional deficiencies could have been asserted under Section 274 (e) of the 1926 Act. If the mere exercise by the taxpayers of their statutory right to appeal to the Board operated to revive an additional deficiency never previously claimed and long since barred, it would in effect impose a severe penalty upon the taxpayer for prosecuting the appeal and thereby rob the appeal of the very benefit which it was designed to confer. It would mean that the statute in one breath gave the taxpayer a right, and in the next breath punished him for exercising that right. Such an effect, we submit, would be grossly at variance with the language and spirit of the Revenue Acts.

(b) The Waivers Given Were Void. Therefore, All Taxes for the Years Covered by Those Waivers are Barred.

Many of the waivers in these cases were signed by the taxpayers after the expiration of the statutory period. We have consistently believed that by virtue of that fact these waivers are void. In view, however, of the recent decision of the United States Supreme

Court in the case of *Charles H. Stange v. The United States,* 75 L. Ed. 195, we avoid reluctantly a further urging of this point. There is, however, an additional defect in the present waivers which is not ruled upon in the *Stange* case. A number of the waivers were approved by the Commissioner after the expiration of the statutory period. Under the provisions of Section 278 (c) of the 1924 Act and the corresponding section of the 1926 Act, the written consent of the Commissioner to an extension by waiver was required. The well-reasoned case of *Joy Floral Co. v. The Commissioner of Internal Revenue,* 29 Fed. 2d. 865, has held that this act on the part of Commissioner must be performed before the expiration of the statutory period in order to give validity to the waiver. It is true that certain recent cases have held that the approval of a waiver by the Commissioner is an administrative rather than a contractual act. Moreover, it might be inferred from the *Stange* case that if the signing of a waiver by the taxpayer after the expiration of the statutory period does not affect the validity of the waiver, the approval of the waiver by the Commissioner after the expiration of the statutory period would likewise not affect its validity. But this precise question was not before the Supreme Court in the *Stange* case, and we respectfully submit that there is a sound basis for distinction between the effect of a tardy execution of a waiver by the taxpayer and a tardy execution of a waiver by the Commissioner. The taxpayer is a free agent and may be bound by his act at any time he performs it. But if the administrative act of the Commissioner in ap-

proving the waiver was prerequisite to its validity, that official act must be performed before the tax became barred by the very statute which required the Commissioner to approve the waiver. In the *Joy Floral* case the Court held that the consent of the Commissioner "shall be executed at a time when the Commissioner still possesses the authority to make an assessment and when he may refuse to consent to any delay in making it."

In the light of the foregoing, we respectfully direct the attention of the Court to the following facts in the present cases:

The second waiver of Leon L. Moise for the year 1918, was signed and approved by the Commissioner on March 25, 1925—25 days after the expiration of the first waiver (Tr. pp. 86-88). For the 1919 taxes of Leon L. Moise, the five-year statutory period elapsed on March 15, 1925. The waiver for that year was not approved by the Commissioner until March 25, 1925—ten days after the expiration of the statutory period (Tr. pp. 100-101). The 1918 tax return for Gerald F. Schlesinger was filed on or before March 25, 1919. The five-year period expired on March 25, 1924. The first waiver of Gerald F. Schlesinger for 1918, expired on March 1, 1925 (Tr. pp. 94-95). The second waiver for 1918 was not approved by the Commissioner until March 25, 1925—twenty-five (25) days after the expiration of the first waiver (Tr. pp. 90-91). The 1919 tax return of Gerald F. Schlesinger was filed March 15, 1920. The five-year period expired on March 15, 1925. The waiver of

Gerald F. Schlesinger for 1919 was not approved until March 25, 1925—ten (10) days after the statutory period had expired (Tr. pp. 92-93). The 1918 tax return for LeRoy Schlesinger was filed March 15, 1919. The five-year statutory period expired March 15, 1924. The 1918 waiver of LeRoy Schlesinger bears no date, but the stamp thereon shows that it was not received earlier than September 19, 1924. This waiver could not have been approved by the Commissioner until after it was received. It bears no approval stamp, but purports to be signed by the Commissioner. The stamp of receipt, however, is dated about six (6) months after the expiration of the statutory period (Tr. pp. 99-100).

III.

THE BOARD ERRED IN DISALLOWING A DEDUCTION FOR LOSS OCCASIONED BY OBSOLESCENCE OF THE TANGIBLE ASSETS OF THE PARTNERSHIP RESULTING FROM PROHIBITION LEGISLATION.

The taxpayers appealed to the Board from such portion of the deficiencies determined in the deficiency letters as resulted from a disallowance by the Commissioner of a deduction for loss occasioned by obsolescence of tangible assets of the partnership. These tangible assets included, on the one hand, leasehold improvements, and on the other hand, furniture, fixtures, and equipment. The obsolescence was occasioned by Prohibition Legislation. The taxpayers contended that they were entitled to a deduction of this loss, apportioned over a period of 18½ months, be-

ginning in 1918 when they first learned that they would be obliged to terminate their business and ending in 1920, when their business was actually terminated by reason of Prohibition Legislation. The Board in its decision denied to the taxpayers the right to make the deductions aforementioned. The decision of the Board in this behalf does not appear to have been based upon any dispute of the proposition of law that loss resulting from obsolescence of the tangible assets of the partnership occasioned by Prohibition Legislation constituted an allowable deduction from gross income. It has often been held that such a deduction is allowable.

Fraser Brick Co. v. Commissioner of Internal Revenue, 10 B. T. A. 1252;
Multibestos Company v. Commissioner of Internal Revenue, 6 B. T. A. 1060;
Boggs & Buhl v. Commissioner of Internal Revenue, 34 Fed. (2d) 859, 860;
The Winter Garden, Inc. v. Commissioner of Internal Revenue, 10 B. T. A. 71;
Appeal of Manhattan Brewing Company, 6 B. T. A. 952;
Appeal of Mary M. Dowling, 6 B. T. A. 976;
Appeal of Northern Hotel Company, 2 B. T. A. 1000.

The adverse decision of the Board on this phase of the cases was apparently based entirely upon the opinion of the Board that the evidence was insufficient as to the value of the tangible assets to warrant an allowance of the deduction claimed (Tr. p. 33). It is our contention that under the law the evidence was

entirely sufficient to warrant an allowance of the deduction, and that accordingly the decision of the Board disallowing the deduction was erroneous.

Ox Fibre Brush Co. v. Blair, 32 Fed. (2d), 42, 45.

The Evidence and the Board's Criticism Thereof.

The evidence on this phase of the cases consisted of the testimony of LeRoy Schlesinger and the ledger of the copartnership. This evidence is wholly undisputed.

(1) Leasehold Improvements.

The Board found that the partnership of Schlesinger & Bender was formed on July 1, 1918, and dissolved on January 16, 1920, at which time its business was terminated (Tr. p. 25); that prior to the formation of the partnership the business was conducted by the taxpayers through a corporation (Tr. pp. 25-26); that the premises and plant occupied by the partnership in its business were leased from H. Levi & Co. in 1910; that the term of the lease was fifteen years; that the lease provided that all additions, such as improvements and fixtures, should be made at the lessee's expense, and at the cancellation or termination of the lease should revert to the lessor (Tr. p. 26); that the lease also provided that no business other than that of the lessee should be conducted on the premises (Tr. p. 26); that the partnership had on its books an item of $7200, the balance remaining in its "building" account (Tr. p. 26). In the body of its opinion the Board found that this sum of $7200 rep-

resented *money expended* in building vats and fixtures, and also building a cellar in the leased premises (Tr. p. 33). The ledger account introduced in evidence showed that depreciation was taken at the rate of 10% per annum (Tr. p. 65). The testimony of LeRoy Schlesinger was undisputed. He testified that the $7200 shown in the ledger was what remained on the "building" account, after deduction of 10% per annum for depreciation; that it was money which the partnership had actually spent in building vats and fixtures and also in building a cellar in the leased premises (Tr. pp. 63-64). He also testified that the item "building" also covered an office that the partnership built in the leased premises (Tr. p. 64). He also testified that the building was vacated on or about April 15th, or May 1st, of 1920, but that the premises were not used for the business after January 16, 1920 (Tr. pp. 72-73). The undisputed evidence also shows that the lease was terminated and the leasehold improvements accordingly forfeited (Tr. pp. 72-74).

The criticism made by the Board of the foregoing evidence is substantially as follows:

That there is insufficiency of evidence as to the value of the tangible assets; that the testimony of LeRoy Schlesinger that the $7200 in the "building" account represented money which had been expended in building vats and fixtures and a cellar in the leased premises does not mean more than that costs of the character referred to were entered in the ledger account, and that after adjustments for depreciation,

and possibly for other reasons, the balance of $7200 remained; that it does not appear how the book values were computed; that there is no proof of costs or appropriate rates of depreciation, nor a segregation or identification of the assets upon which the obsolescence was predicated (Tr. p. 33).

We respectfully submit that this criticism of the evidence is wholly unwarranted and unsupported. The sum of $7200 as the balance remaining of actual cost expended is known and certain. The undisputed testimony of LeRoy Schlesinger shows that it represented moneys actually expended by the partnership. The rate of depreciation is fixed definitely both by the testimony of LeRoy Schlesinger and the ledger account at ten per cent per annum. Upon termination of the lease and business, the improvements reverted to the lessor and the partnership received nothing therefor. The evidence to this effect is definite and undisputed. Since the sum of $7200 represented the balance of moneys actually expended by the partnership for leasehold improvements, after figuring a definite depreciation at the rate of ten per cent per annum, and since, when the partnership and lease terminated, this amount was totally lost to the partnership, it is obvious that a deductible loss existed. It is therefore submitted that the findings and decision of the Board on this phase of the case are contrary to the evidence and without support in the evidence and that the evidence was entirely sufficient under the law to warrant the deduction claimed.

(2) **Furniture, Fixtures and Equipment.**

The Board found with respect to this phase of the case that there was a balance in the "furniture and fixtures" account of $13,965.03; that upon closing its affairs early in 1920, the partnership sold its furniture and equipment, but that no entries of such sales were made on its books (Tr. p. 26).

Paragraph 5 (b) of the amended answers admits the allegations contained in Subdivision (b) of paragraph 5 of the petitions. These allegations were to the effect that the sum of $7801.18 was the total proceeds from the sales of cooperage, scrap and office furniture (Tr. pp. 7, 17). Moreover, the testimony of LeRoy Schlesinger shows that the entry of what these items were sold for was made in a little pass book (Tr. p. 74). LeRoy Schlesinger also testified that $13,965.03 remained in this account on December 31, 1918 (Tr. p. 63). The ledger shows a balance on June 30, 1918, of $13,965.03 in this account (Tr. pp. 66, 67). It also shows all purchases made in this account, including the costs and items purchased. It also gives the rate of depreciation charged off yearly and shows the balance remaining. It must be remembered that the partnership took over all of the assets of the corporation on July 1, 1918, and the fact that it continued to use the same books as the corporation is evidenced by the ledger sheet (Petitioner's Exhibit 1), showing entries beginning as early as January 1, 1916. The ledger sheet also shows the rate of depreciation to have been ten per cent per annum.

The Board's criticism of the evidence bearing upon this phase of the case is substantially the same as that bearing upon the matter of leasehold improvements. We respectfully submit that this criticism is wholly unfounded and that the evidence is entirely sufficient under the law to warrant the deduction claimed.

The undisputed evidence shows that the cost of the furniture and fixtures was $13,965.03 after all deductions for depreciation (Tr. pp. 66, 67). The rate of depreciation, to-wit: ten per cent per annum, was also established. The amount received from the sale of the furniture and fixtures was $7801.18. The loss sustained by the partnership in this behalf is the difference between the two last-mentioned figures. The original costs of a considerable number of the items comprising this sum of $13,965.03 are reflected in the ledger sheets (Tr. pp. 66, 67). Determination of the original costs of the remaining items is merely a matter of mathematical computation, since the rate and amounts of depreciation were established. We submit that the Board's decision is therefore wholly unsupported by its own findings and is wholly contrary to the evidence.

We respectfully call to the attention of the Court the following decisions:

Fraser Brick Co. v. Commissioner of Internal Revenue, 10 B. T. A. 1252;

Multibestos Company v. Commissioner of Internal Revenue, 6 B. T. A. 1060;

Boggs & Buhl v. Commissioner of Internal Revenue, 34 Fed. (2d) 859, 860;

The Winter Garden, Inc. v. Commissioner of Internal Revenue, 10 B. T. A. 71;

Appeal of Manhattan Brewing Company, 6 B. T. A. 952;

Appeal of Mary M. Dowling, 6 B. T. A. 976;

Appeal of Northern Hotel Company, 2 B. T. A. 1000.

We respectfully submit that the cases cited above clearly indicate that it was necessary for the taxpayer merely to prove the unextinguished cost of the property with respect to which deduction is made. In the present cases there is no difficulty in arriving at the figures of unextinguished cost.

We therefore urge that the taxpayers are entitled to a deduction from gross income for the sum remaining in their building account and for the sum remaining in their furniture and fixtures account less amounts received by way of salvage; which deductions should be allocated over the period beginning July 1, 1918, and ending on January 16, 1920.

Section 143, Regulations 45;

Section 214 (a) 8 of the Revenue Acts of 1918 and 1921;

Dean etc. v. Hoffheimer Bros. Co., 29 Fed. (2d) 668;

Lynch v. Alworth-Stephens Co., 267 U. S. 364; 69 L. Ed. 660;

Pittsburg Hotel v. Commissioner, 43 Fed. (2d) 345.

IV.

PETITIONERS WERE ENTITLED TO A DEDUCTION FOR LOSS OCCASIONED BY OBSOLESCENCE OF THE GOOD WILL OF THE PARTNERSHIP BUSINESS DUE TO PROHIBITION LEGISLATION.

The Commissioner allowed to the petitioners a deduction for loss occasioned by obsolescence of good will of the partnership business. As previously indicated, the Board disallowed the deduction, basing its action upon certain defensive allegations of the amended answers alleging that the Commissioner had erred in allowing the deduction. We have pointed out in a previous portion of this brief that the injection of this issue in the Board appeals was error. The Commissioner offered no evidence to support the defensive allegations of the amended answers. Therefore as far as the facts are concerned the propriety of the deduction with respect to obsolescence of good will is conceded. The question of law remains.

In the case of *Jesse W. Clark, etc. v. The Haberle Crystal Springs Brewing Company,* decided on January 27, 1930, 74 L. Ed. 498, the Supreme Court of the United States disallowed a deduction claimed for loss resulting from obsolescence of the good will of a brewery business occasioned by Prohibition Legislation. This decision was rendered subsequent to the filing in these proceedings of the petitions for review. The following language from the opinion of Justice Holmes in that case indicates the theory upon which the case was decided:

> "It seems to us plain without help from Mugler v. Kansas, 123 U. S. 623, that when a business

is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government, or a partial compensation in the form of an abatement of taxes otherwise due."

We respectfully direct the attention of the Court to the fact that the business of these petitioners was lawful until the enactment of legislation against it. The petitioners do not claim compensation from the Government. They claim the right to deduct a loss occasioned by an observance on their part of the law. To deny them an allowance of deduction for heavy losses honestly incurred is to penalize them for obeying the law. This, we submit, is contrary to the intent of Congress. We respectfully urge a consideration of this question on the part of this Honorable Court.

CONCLUSION.

It is respectfully urged that the decisions of United States Board of Tax Appeals in these cases be reversed.

Dated, San Francisco,
February 21, 1931.

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